2. Even If Dark Fiber Were a Network Element, il Does Not Meet Section 251(d)(2)'s "Impair" Standard.

Independent of whether dark fiber meets the definition of "network element," dark fiber is widely available in the market and thus fails to satisfy section 251(d)(2)'s "impair" test. As explained above, numerous carriers are laying fiber throughout the United States. Indeed, CLECs are laying fiber at a faster rate than ILECs. New Paradigm Group estimated that CLECs deployed 78,506 fiber miles by the end of 1997. UNE Fact Report at III-27. In addition, Corning, one of the largest fiber suppliers, states that CLEC demand for fiber increased by 45 percent in 1998, compared with an increase of only 10 percent for ILECs. *Id.*

There is also a wholesale market for dark fiber. Companies such as Frontier, GST, IXC, Level 3, Metropolitan Fiber Networks ("MFN"), Qwest, and Williams lease their excess capacity. *Id.* at III-25. Likewise, utility companies are deploying fiber, both in partnership with CLECs and on their own. Taking just one example, MFN, a publicly traded company that specializes in the provision of dark fiber capacity, has installed local intra-city networks that, by the end of 1998, had 160,000 fiber miles covering over 400 route miles in four major metropolitan areas (New York, Philadelphia, Washington D.C. and Chicago). Expansion plans in these four areas will bring the total infrastructure in these markets to approximately 357,000 fiber miles covering 846 route miles. In addition, MFN has begun laying fiber in the San Francisco and Boston markets, with plans for expansion into the Los Angeles, Seattle, Dallas, Houston and Atlanta

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element under the Act and is not subject to unbundling").

areas within two years.[66] Financing for this expansion was obtained through the November 25, 1998 issuance and sale of $650 million of Senior Notes.[67]

The capital markets therefore believe that dark fiber is a commodity that can be provided by companies such as MFN on a competitive basis with the ILECs. Indeed, the Enron Corporation recently unveiled plans to "create a market to trade communications capacity . . . through a standard contract, similar to those used in trading orange juice, soybeans, and natural gas."[68] This kind of commoditized trading will allow CLECs to "customize the amount of bandwidth available to them at any particular time,"[69] guaranteeing a ready source of non-ILEC supply. CLECs cannot therefore be "impaired" in their ability to provide service without access to ILEC fiber.

Even if the Commission were to conclude that dark fiber is a "network element" and meets the "impair" standard, it should nevertheless not require ILECs to provide it on an unbundled basis. ILECs must fulfill their state obligations as carriers of last resort, providing service to any and all customers as the need arises within a reasonable time frame. By having dark fiber in reserve, ILECs can respond to increases in consumer demand. If the facilities are not available to satisfy these needs, ILECs will be forced to construct new facilities swiftly and

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[66] Metropolitan Fiber Networks, SEC Form 10-K, at 4 (year ending Dec. 31, 1998).

[67] *Id.* at 6.

[68] Kathryn Kranhold, *Enron Planning to Create a Market to Trade Communications Capacity*, Wall St. J., May 20, 1999, at A11.

[69] *Id.*

on short notice, which will increase both the costs of construction and the length of time customers will wait for service. Moreover, if ILECs construct facilities that a competitor may take at will, ILECs will be discouraged from engaging in necessary long-term business planning because they cannot enjoy the fruits of their investments. With ample numbers of firms installing fiber, there is no reason to force ILECs to serve as construction companies for CLECs.

C. Section 251(c)(3) Does Not Obligate ILECs To Combine Network Elements They Do Not Already Combine.

The Commission also requests comment on whether ILECs can be required "to combine unbundled network elements that they do not already combine." *Second Further NPRM* ¶ 33. This question already has been answered in the negative by the Eighth Circuit when it vacated Rule 315(c). That rule provided that "an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network." As the Eighth Circuit noted, "the plain language of the Act indicates that the requesting carriers will combine the unbundled elements themselves." *Iowa Utils. Bd. v. F.C.C.*, 120 F.3d 753, 813 (8th Cir. 1997). The Commission did not appeal that ruling and the Supreme Court's decision in *Iowa Utilities Board* did not affect the Eighth Circuit's determination. While the Court stated that ILECs may not disassemble elements that already are combined, it neither expressly nor implicitly suggested that ILECs have an affirmative duty to combine unbundled network elements at a CLEC's behest. *Iowa Utils. Bd.*, 119 S. Ct. at 736-38.

Requiring ILECs to combine elements that they do not already combine would also be inconsistent with the statute's parity of service requirements. The non-discrimination language in section 251(c)(3) cannot be read to compel ILECs to provide CLECs access to service or facilities that ILECs do not provide for themselves. In this regard, the Eighth Circuit observed that:

> "The fact that interconnection and unbundled access must be provided on rates, terms, and conditions that are nondiscriminatory merely prevents an incumbent LEC from arbitrarily treating some of its competing carriers differently than others; it does not mandate that incumbent LECs cater to every desire of every requesting carrier." *Iowa Utils. Bd.*, 120 F.3d at 813.

Such catering, of course, is precisely what the Commission seeks comment on here.

Finally, even if forcing ILECs to combine network elements in any manner requested by a CLEC were consistent with section 251(c)(3), such a requirement would not satisfy section 251(d)(2)'s "impair" standard. *First*, and dispositively, CLECs are free to combine ILEC unbundled network elements themselves, as contemplated by the Act. *Second*, there are substitutes available in the market for many of the combinations of interest to CLECs. For example, in the *Notice of Proposed Rulemaking*, the Commission asks specifically about CLECs' ability to combine unbundled loops and transport. *Second Further NPRM* ¶ 33. Both special access and intraLATA private lines can be provisioned to provide the same functionality as an unbundled loop combined with transport. Since CLECs can create any combination of elements either themselves or by purchasing services that provide similar functionality, there is no basis for concluding that a CLEC would be impaired if ILECs do not combine network elements on its behalf.

D. While the Act Precludes the Commission From Requiring ILECs To Provide xDSL Conditioned Loops, Nothing Limits the Commission's Ability To Encourage ILECs and CLECs To Negotiate Appropriate Terms and Conditions in Their Interconnection Agreements.

In the *Notice of Proposed Rulemaking*, the Commission stated that "nothing in the statute or the Supreme Court's opinion . . . preclude[s] us from requiring that loops that must be unbundled must also be conditioned in a manner that allows requesting carriers supplying the necessary electronics to provide advanced telecommunications services."[70] *Second Further NPRM* ¶ 32. This conclusion is contrary to the Act. Section 251(c)(3) requires ILECs to provide access to network elements on a "nondiscriminatory" basis. On its face, this section does not compel an ILEC to provide different or better facilities to CLECs than the ILECs provides for their own use.

In the *First Report and Order*, the Commission adopted Rule 311, which obligated ILECs to provide CLECs with network elements "superior in quality to that which the incumbent LEC provides to itself." However, the Eighth Circuit concluded that this rule was inconsistent with the Act, holding "that subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's existing network -- *not to a yet unbuilt superior one*." *Iowa Utils. Bd.*, 120 F.3d at 813 (emphasis added). This ruling was not disturbed by the Supreme Court's decision.

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[70] GTE interprets "conditioning" to mean the removal of any existing load coils and bridge taps. In addition, a two-wire Digital Loop, dependent on loop make-up, may be configured to support Enhanced Copper Technologies, such as ADSL. When using ADSL technology, the CLEC is responsible for limiting the Power Spectral Density of the signal to levels specified in Clause 6.13 of the ANSI T1.413 ADSL standard.

Therefore, the Commission's conclusion that the Act does not preclude it from forcing ILECs to provide conditioned loops is incorrect.

Nevertheless, in markets where GTE does not provide conditioned loops to itself, it does provide such loops through a wholesale tariff. Moreover, GTE does agree that, where an ILEC is otherwise required to unbundle loops and provides conditioned loops to itself, the Commission could require that conditioned loops be unbundled. This obligation should be imposed on a central off-by-central office basis: if an ILEC provides conditioned loops to itself in a particular central office, CLECs could secure unbundled access to conditioned loops in that office pursuant to section 251(c)(3). There is therefore no situation in which CLECs requiring access to conditioned loops could not procure them from GTE where technically feasible.

E. A Mandatory Nationwide Requirement for Sub-Loop Unbundling Is Contrary To the Act, Unnecessary, and Raises Technical and Network Integrity Issues.

The Commission requests comment on whether, as a result of technology changes, it should require sub-loop unbundling at the remote terminal or at other points in the ILEC's network.[71] Because sub-loop unbundling does not meet section 251(d)(2)'s "impair" standard, the Commission may not order such unbundling. As an initial matter, in areas where access to unbundled loops does not meet the statutory standard, *a fortiori* sub-loop unbundling also cannot be ordered since the finding that loops are unnecessary presumes the existence of competitive

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[71] *Second Further NPRM* ¶ 33. As GTE will explain in its comments on the Advanced Services Further Notice, *see Deployment of Wireline Services Offering Advanced Telecommunications Capability,* First Report and order and Further Notice of Proposed Rulemaking, CC Docket No. 98-147 (rel. Mar. 31, 1999), spectrum unbundling should not be considered sub-loop unbundling, and loop spectrum is not a network element.

alternatives. Likewise, in areas where CLECs require access to unbundled loops, mandatory sub-loop unbundling is unnecessary because CLECs can take the whole loop and will not be impeded from providing competitive service.

In addition, even if sub-loops met the section 251(d)(2) standard, which they do not, sub-loop unbundling continues to raise complex technical, administrative, and operational issues.[72] There are dozens of different loop configurations, each with a distinct combination of network elements and technologies. Because of this, access at the sub-loop level must be evaluated on a case-by-case basis to determine whether access is feasible and whether the requesting carrier is willing to compensate the ILEC for the required work. For example, sub-loop unbundling might be accomplished via collocation of CLEC equipment such as a digital loop carrier ("DLC") cabinet at remote terminals or via the placement of CLEC facilities at an adjacent location close to, but outside of, the ILEC remote terminal. Both of these approaches may encounter difficulty depending on the network configuration involved. With the collocation alternative, space availability may be an issue because many first generation DLCs do not have any extra space within the cabinet to accommodate the placement of CLEC equipment. Similarly, the placement of CLEC facilities adjacent to the LEC's remote terminal may raise issues related to rights-of-way, zoning restrictions, local ordinances, and power supply that need to be evaluated and resolved to determine if access is indeed feasible. Therefore, sub-loop unbundling is entirely

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[72] The Commission considered this issue in the first Local Competition proceeding and declined to require sub-loop unbundling because of the practical implications for network reliability and service integrity. *First Report and Order* ¶ 391. Because technological changes have not resolved these problems, a nationwide sub-loop unbundling requirement is still unwarranted.

unsuited for rules of nationwide applicability and should be addressed through a bona fide request process, in which the ILEC evaluates whether a specific request is a realistic alternative. This approach is already being utilized in 172 of the interconnection agreements that GTE has in place with CLECs.[73]

F. Inside Wire on the Customer's Side of the Demarcation Point Is Not a "Network Element" and Therefore Cannot Be Subject To an Unbundling Obligation.

The *Notice of Proposed Rulemaking* seeks comment on "situations where the incumbent LEC owns facilities on the end user's side of the network demarcation point and whether those facilities should be unbundled under section 251(c)(3)." *Second Further NPRM* ¶ 33. There is no legal or practical basis for the Commission to impose an unbundling requirement on ILECs for these facilities.

First, by definition, facilities on the *customer's* side of the network demarcation point are not network elements. The demarcation point is "the point at which the telephone company's facilities and responsibilities end and customer-controlled wiring begins."[74] Since the ILEC's network facilities end at the demarcation point, any facilities on the customer's side of that point are not part of the ILEC network and thus cannot be a network element.

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[73] GTE has offered sub-loop unbundling via a bona fide request process for two and one-half years. To date, GTE has received no firm requests from CLECs responding to this offering.

[74] *Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, 12 FCC Rcd 11897, at ¶ 1 (1997) ("*Demarcation Point Reconsideration Order*").

Second, even if inside wiring were a network element, it plainly does not meet section 251(d)(2)'s "impair" test. The market for telephone inside wiring installation and maintenance is robustly competitive, and consumers have many choices among such providers. Indeed, the Commission's stated objective in detariffing inside wire more than 10 years ago was to "foster competition in the inside wiring installation and maintenance markets, to promote new entry into those markets, . . . and to foster the development of an unregulated, competitive telecommunications marketplace."[75] These goals have been fully realized, as can be documented by examining the Yellow Pages listings for electrical contractors. For example, in Washington D.C., there are 52 such electrical contractors listed in the Yellow Pages.[76] This competitive market precludes any argument that inside wire must be unbundled.[77]

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[75] *Detariffing the Installation and Maintenance of Inside Wiring*, 1 FCC Rcd 1190, at ¶ 8 (1986) *("Detariffing Reconsideration Order")* (subsequent history omitted).

[76] Electrical Contractor Listings, GTE Super Pages (Internet Yellow Pages) (May 20, 1999) <http://yp6.superpages.com/listings.phtml?SRC=&STYPE=S&PG=L&C=electrical+contractors&N=&T=&S=DC&R=N&search=Find+It&rtd=yp12.superpages.com>.

[77] Further confirming that inside wire does not meet the impair test, the Commission's rules already promote the competitively-neutral placement of the network demarcation point. *See, e.g.*, *Modifications to the USOA System of Accounts*, CC Docket No. 82-261, 48 Fed. Reg. 50534 (1983) (complex wiring detariffing) (subsequent history omitted); *Detariffing Reconsideration Order*, 1 FCC Rcd 1190; *see also Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, 5 FCC Rcd. 4686 (1990) (subsequent history omitted). For example, the Commission's rules applicable to multi-unit buildings (where access issues may be most acute) provide that the demarcation point either be located: (1) in accordance with the ILEC's reasonable and non-discriminatory standard practices for wiring installed as of August 13, 1990; or (2) at the minimum point of entry (MPOE) or another point(s) designated by the building owner for installations after that date. *See* 47 C.F.R. § 68.3. Consistent with these rules, GTE's policy is to install the network demarcation point at the MPOE where practical for new installations. GTE also relocates the existing demarcation point(s) in pre-1990 multi-unit buildings to the MPOE: (1) in accordance with any

Third, even if there were a legal basis to mandate unbundling of these facilities, there is no practical basis upon which to require such unbundling. The Commission's decisions establishing a telephone network demarcation point and creating a customer's right to control access to the telephone plant on his or her side of the demarcation point -- the so-called telephone "inside wiring" -- make clear that ILECs may not use any interest in such wiring to "restrict the removal, replacement, rearrangement, or maintenance of inside wiring."[78] Accordingly, it is the individual customer -- not the ILEC -- that either owns or has the right to grant access to telephone inside wiring and other related facilities on the customer's side of the demarcation point.

VII. TO ENSURE THAT ITS UNBUNDLING REQUIREMENTS CONTINUE TO COMPLY WITH THE COMMANDS OF SECTION 251(d)(2), THE COMMISSION SHOULD SUNSET AND REVISIT THESE REQUIREMENTS IN TWO YEARS.

Finally, the Commission solicited comment in the *Notice of Proposed Rulemaking* on whether it should sunset "the unbundling obligations as technology and market conditions evolve over time," *Second Further NPRM* ¶ 11, recognizing that "technological, competitive and economic factors may, over time, affect the availability of network elements from sources outside the incumbent LEC's network," *id.* ¶ 36. The Commission has, in the past, used sunset provisions repeatedly when changing market conditions threatened to render its rules obsolete or

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applicable state law requirements; (2) in situations where the wiring undergoes a major modification, addition, or rearrangement; or (3) upon the request of a building owner or another carrier acting on behalf of the property owner.

[78] *Demarcation Point Reconsideration Order*, 12 FCC Rcd 11897, at ¶ 6.

contrary to the commands of the Act. Thus, the Commission recently adopted a provision sunsetting its CMRS structural safeguard rules at a date certain "unless the Commission determines that the competitive conditions in the local exchange market are such that continuation of these safeguards is in the public interest."[79] The Commission has likewise adopted sunset provisions when "it was reasonable to anticipate that," by a certain date, competitors "would have established a . . . presence" in new markets.[80]

Likewise, here, the Commission should sunset its unbundling requirements in a reasonable time, such as two years, to guarantee that rapid changes in the telecommunications marketplace do not render the Commission's rules injurious to competition and therefore in contravention of the Act. Since 1996 alone, the number of CLECs deploying fiber networks used to provide competitive transport and loops has grown from 29 to 60, and the number of cities served by these CLEC networks has grown form 130 to 289. UNE Fact Report at II-6. The deployment of interoffice transport facilities is estimated to grow by an additional *60 percent* between 1996 and 2000. NECI Report at 30. Before the Act was passed in 1996, CLECs operated only 65

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[79] *Establishment of Competitive Service Safeguards for LEC Provision of* CMRS, Report and Order, W.T. Docket No. 96-162, 12 FCC Rcd 15,668, at ¶ 95 (1997).

[80] *Cellular Telecommunications Industry Association's Petition for Forbearance from CMRS Number Portability Obligations*, Memorandum Opinion and Order, CC Docket No. 95-116, 1999 WL 58618, at ¶ 39 (1999); *see also Rules and Policies for Local Multipoint Distribution Services and for Fixed Satellite Services*, Second Report & Order, 12 FCC Rcd 12545, at ¶ 198 (1997) (adopting a three-year sunset for the eligibility restriction of licensing LMDS because a limited restriction would promote competition); *Interconnection and Resale Obligations Pertaining to CMRS*, Second Report and Order, 11 FCC Rcd 9462, at ¶ 32 (1996) (adopting a five-year sunset on roaming regulations because "cellular, broadband PCS and covered SMR services will be substantially competitive within five years")

switches; since that time, CLECs have deployed 659 additional switches. UNE Fact Report at I-1. These facts demonstrate that two or three years of competition can make a tremendous difference in the composition of the marketplace -- and that network elements that may once have been available only from an ILEC can quickly become ubiquitous.

Given the growing deployment of new alternatives to traditional wireline service, this pace of change will only accelerate in the coming years. In the eight representative GTE markets studied by PNR, at least four different companies -- AT&T, Cox Communications, MediaOne (assuming it does not conclude its merger with AT&T), and Time Warner Telecom -- plan to roll out cable-based local service within the next two years. PNR Report at 29, 31, 75. In other parts of the country, numerous cable companies -- including Adelphia, Cablevision, Comcast, and Jones Intercable -- plan to follow suit. UNE Fact Report at III-18-19. Thus, as Congress concluded when adopting the Act, cable-based local service will create "meaningful facilities based competition" for ILEC service, "given that cable services are available to more than 95% of United States homes." H.R. Conf. Rep. No. 104-230, at 148 (1996). Likewise, as the price of wireless service continues to fall, there is, in the Commission's words, "a greater likelihood that customers will view their wireless phones as a potential substitute for their wireline phones."[81] This development is particularly likely in rural markets where the cost of wireless local loops is already far below the cost of deploying traditional wireline loops. Because "42% of all Americans would consider switching their local phone service to wireless," UNE Fact

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[81] *Cellular Telecommunication Industry Association's Petition for Forbearance*, WT Docket No. 98-229, 1999 WL 58618, at ¶ 23 (1999).

Report at III-24, there is little question that wireless service is rapidly becoming a substitute for traditional ILEC-provided local service.

The Supreme Court made clear that the Commission's unbundling rules could not satisfy the requirements of section 251(d)(2) unless they were based on the "availability of elements outside the incumbent's network." *Iowa Utils. Bd.*, 119 S. Ct. at 735. The Commission can predict with complete certainty -- based on the last three years of history and the investments CLECs have made in the future -- that the landscape of elements available outside ILEC networks will change dramatically in the next two years. In the same way that the Commission could not base reasonable unbundling rules today on two-year-old data, it should not allow the rules it establishes here to become so stale that they undermine the Act's purpose of promoting competition in the future.

Thus, the Commission's concern that "adoption of a 'sunset' provision would constitute forbearance prohibited under section 10(d) of the Act" is misplaced. *Second Further NPRM* ¶ 40. It would only constitute forbearance if the Commission declined to impose an unbundling obligation on an element that satisfied the test established in section 251(d)(2). A sunset, coupled with Commission review of the unbundling requirements and promulgation of new rules that comply with section 251(d)(2), would involve no such forbearance. Instead, the Commission would be guaranteeing that *only* the elements that continued to satisfy the Act's unbundling standards remained subject to such obligations.

Rather than being contrary to the Act, a sunset is essential to the success of its pro-competitive enterprise. Unbundling rules that are overbroad -- either when enacted or when

rendered so by the passage of time -- deter CLECs from deploying their own facilities, make it more difficult for existing facilities-based CLECs to compete, and discourage ILECs from improving their facilities. To guarantee that its unbundling rules do not dilute these critical incentives to compete -- a result fundamentally at odds within the plain command of section 251(d)(2) and the Act's pro-competitive purpose -- the Commission should sunset and revisit any unbundling obligations it imposes within two years.

VIII. PROPOSED RULES.

For the foregoing reasons, GTE respectfully suggests that the Commission adopt the following proposed unbundling requirements.

§ 51.319 Specific Unbundling Requirements

(a) *Elements to be unbundled.* An incumbent LEC shall provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory, unbundled access in accordance with section 251(c)(3) of the Act only to the following network elements:

(1) *Local loop.* (i) An incumbent LEC shall unbundle the local loop for use in providing telecommunications service to (A) a business customer with fewer than 20 lines at the location the requesting carrier seeks to serve, or (B) a residential customer who does not live in a building with multiple dwelling units.

(ii) Notwithstanding subparagraph (1)(i), an incumbent LEC shall not be required to unbundle a local loop deployed to serve a residential or commercial development that is completed after the effective date of these rules.

(iii) The local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC and the network interface device at an end user customer premises. An incumbent LEC shall not be required to condition a loop for a requesting telecommunications carrier in any central office where the incumbent LEC does not provide conditioned loops to itself, an affiliate, or an end user customer.

(2) *Transport.* (i) An incumbent LEC shall unbundle interoffice transport to or from any wire center with fewer than 15,000 lines.

(ii) Where unbundling is required, the transport element shall include: (A) dedicated transport, defined as incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carries; and (B) shared transport, defined as transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end offices switches and tandem switches, and between tandem switches, in the incumbent LEC's network.

(iii) Where unbundling is required, the incumbent LEC shall: (A) Provide a requesting telecommunications carrier exclusive use of dedicated transport facilities, or use of the features, functions, and capabilities of shared transport facilities; (B) Permit, to the extent technically feasible, a requesting telecommunications carrier to connect such interoffice facilities to equipment designated by the requesting telecommunications carrier, including, but not limited to, the requesting telecommunications carrier's collocated facilities; and (C) Permit, to the extent technically feasible, a requesting telecommunications carrier to obtain the functionality provided by the incumbent LEC's digital cross-connect systems in the same manner that the incumbent LEC provides such functionality to interexchange carriers.

(3) *Wholesale operations support systems functions.* An incumbent LEC shall provide unbundled access to operations support system functions to a requesting telecommunications carrier in connection with the unbundled provision of another network element from the incumbent LEC or the wholesale provision the incumbent LEC's local exchange services. Operations support systems functions consist of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information.

(b) *Proprietary features, functions, or capabilities of elements.* Access under this rule to a proprietary feature, function, or capability of a network element otherwise required to be unbundled shall be available only where such proprietary feature, function, or capability is integral to the operation of the network element such that a requesting telecommunications carrier cannot make use of the network element without such access.

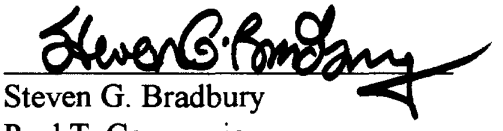
(c) *No state expansion of unbundling requirement.* No state shall require an incumbent LEC to provide unbundled access to any element not identified in subsection (a).

(c) *Sunset.* The requirement to provide unbundled access to an element identified in subsection (a) shall expire two years after the effective date of this rule unless the Commission finds that continued access to that element of the incumbent LEC's network is essential to enable a requesting telecommunications carrier to compete effectively against the incumbent LEC in the local exchange market. Upon sunset of the requirement to provide unbundled access to an element, an ILEC shall no longer be required to offer unbundled access to that element, notwithstanding any provision in an effective section 252 interconnection agreement that otherwise would compel such access.

(e) *Effect of Section 252(i).* A telecommunications carrier may not use section 252(i) to obtain access to any unbundled network element unless that element is listed in subsection (a).

Dated: May 26, 1999

Respectfully submitted,



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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	

DECLARATION OF ALFRED E. KAHN IN RESPONSE TO SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

I. INTRODUCTION AND SUMMARY

1. My name is Alfred E. Kahn. My business address is 308 N. Cayuga Street, Ithaca, NY 14850. I am the Robert Julius Thorne Professor of Political Economy, Emeritus, Cornell University and Special Consultant with National Economic Research Associates, Inc. (NERA).

2. I received my A.B. degree summa cum laude from New York University and my Ph.D. from Yale University, in 1942. I served as Associate Economist with the Antitrust Division of the U.S. Department of Justice in 1941-42; came to Cornell University as Assistant Professor in 1947 and have served successively as Chairman of the Department of Economics, Robert Julius Thorne Professor of Political Economy, member of the Cornell Board of Trustees and Dean of the College of Arts and Sciences. I have been Chairman of the New York State Public Service Commission and of the (U.S.) Civil Aeronautics Board; and in my capacity as Advisor to President Carter on Inflation, I participated actively in the successful efforts of his Administration to deregulate both the trucking industry and the railroads. I am the author of

the two-volume *The Economics of Regulation*, reprinted in 1988 by MIT Press, *Letting Go: Deregulating the Process of Deregulation*, published last year by Michigan State University Institute of Public Utilities, and have written and testified extensively in the area of direct economic regulation and particularly regulation of public utilities. Of especial relevance to my statement here, I am the co-author of *Fair Competition, The Law and Economics of Antitrust Policy*; was a member of the Attorney General's National Committee to Study the Antitrust Laws and the National Commission on Antitrust Laws and Procedures in the Eisenhower and Carter Administrations, respectively; I have served as consultant with both the Antitrust Division of the Department of Justice and the Federal Trade Commission; and I have published numerous articles, particularly in recent years, on the requisites of efficient competition in regulated and previously regulated industries. I attach a copy of my full resume.

3. In its Second Further Notice of Proposed Rulemaking on local competition, the Federal Communications Commission requested comments on a number of issues related to the mandatory provision of unbundled network elements by incumbent local exchange carriers ("ILECs"). The purpose of this Declaration is to respond to the Commission's questions and tentative conclusions from an economic perspective.

4. The questions that appear to be most critical are:

- Should there be a uniform national list of network elements that all ILECs must unbundle?

- Should an "essential facilities" criterion be the basis for determining the composition of the list or lists?

- How should any such list evolve over time as technology and competition develop?
- Should new network functions and elements be treated differently from the elements that currently provide voice telephony over circuit switches?

5. In framing its answers to these questions, I will submit, the Commission must be guided above all other considerations by the goal of promoting efficient and dynamic competition in the service of the consuming public, rather than the fostering or protecting of individual competitors, as such. There is no economic principle, or principle of antitrust policy, more fundamental than the distinction between these two goals, whenever the two conflict.

6. Closely related, in economic principle, is the superiority of facilities-based competition over competition based on using the facilities of the incumbent firms, in whole or in part. This is not to contradict the recognition, in the Telecommunications Act, of the need to require the incumbent local telephone company monopolies, so long as they remain monopolies, to lease unbundled elements of their networks to aspiring entrants or make retail services available to them for resale, at regulatorily-stipulated rates, particularly in the transition to full-blown competition. It is to say that the designation of elements subject to mandatory sharing must be informed by a recognition of the elementary fact that the more liberal that definition, both in scope and in time (and the lower the mandated price), the less the incentive for facilities-based entry *and* for creative investment by incumbents and entrants alike; and the more, therefore, the Commission will have erred on the side of increasing the count of *competitors* at the expense of creative and dynamic *competition*.

II. THE ECONOMIC PRINCIPLES THAT MUST INFORM THE MANDATORY UNBUNDLING REQUIREMENTS

7. In order to understand why the Supreme Court was absolutely correct, in economic terms, in instructing the Commission to give some substance to the qualifications imposed by the "necessary" and "impair" standards in section 251(d)(2) of the Telecommunications Act for identifying the network elements that ILECs were to be required to make available to their competitors—beyond the "need" that might be inferred from the mere request by the latter for such access—and in order for the Commission to comply with its instructions, it is essential that it be guided by the following fundamental economic principles:

a. The socially beneficial competition in the service of the public that it was the intention of the Act to encourage consists, in its essence, in the quest for differential advantage, whether because of the achievement of superior efficiencies or in the offer of superior goods and services to the public.

b. The most creative and productive form of competition is innovation—in the methods of producing and supplying existing products and services and in developing new product and service offerings.

c. Innovation is, by its inherent nature, risky; it involves the expenditure of resources on endeavors whose outcome cannot be predicted with certainty.

d. Because, in a competitive market economy, those risks are borne by private investors, the risk of losses from ventures that turn out unsuccessfully must be balanced by the prospect of exclusive enjoyment of the fruits of successful

ones.[1] This is of course the essential logic of our patent laws. But the principle extends beyond patentable inventions, deserving of governmental guarantees of exclusivity: it is also the basis of the general principle, under the antitrust laws, that

> There is no general duty to share. Compulsory access, if it exists at all, is and should be very exceptional.[2]

e. Further underlining the generality of this proposition is Judge Hand's famous—and, to our knowledge, universally accepted—warning, in his *Alcoa* decision, that "the successful competitor, having been urged to compete, must not be turned upon when he wins."[3] In view of the fact, as I have already emphasized, that competition and innovation themselves consist in a quest for differential advantage, a requirement that the benefits be shared, on regulatorily dictated terms, in the cases in which that quest has been successful would interfere with the competitive process itself.

f. A reasonable case can be made in the context of public utilities, however, that an incumbent company is typically in command of some facilities "essential" or

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[1] The ECONOMIST has recently cited a study that

> found that the overall rate of return for some 17 successful innovations made in the 1970s averaged 56 percent. Compare that with the 16 percent average return on investment for all American business over the past 30 years. (February 20, 1999)

[2] Philip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 852 (1989). In par. 21 of its *Second Further Notice of Proposed Rulemaking*, the Commission sought comment on the relevance of the essential facilities standard in determining unbundled elements, pursuant to section 251(d)(2). In the present context, an essential facility is an input to production that meets three conditions: (1) it is used to produce a competitive telecommunications service, (2) it is only available from a monopoly supplier that competes in retail markets, and (3) it cannot be economically or technically duplicated.

"necessary" to rivals not because of superior enterprise on its part but primarily because of its franchised monopoly, and that requiring it to share the benefit of those facilities with rivals at a compensatory price would not entail penalizing successful competitive efforts or innovation. The mandatory sharing requirements of the Telecommunications Act do not, therefore, in themselves conflict with the requirements of effective competition. On the contrary, they can, if properly administered, contribute to it.

g. Recognition of this possibly exceptional character of the situation in public utility industries in process of deregulation must not be permitted to obscure the fundamental propositions to which it provides the exception, however, and its application must be consistent with the governing principles I have previously enunciated. In particular:

- It justifies mandatory sharing only of facilities carried over from the public utility past: promotion of aggressive competition and risky investments in innovation henceforward would still be frustrated if those obligations were extended to the fruits of such efforts.

- Wherever mandatory sharing, for the sake of jump starting the entry of competitors, would interfere with the more creative and dynamic investment in facilities-based competitive entry and innovation by incumbents and challengers alike, it is the latter that must take primacy.

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[3] *United States v. Aluminum Co. of America*, 148 F. 2d. 416, 430 (1945). This decision also contains the admonition against a monopoly being condemned if the monopoly power was "thrust upon" its possessor, or if

h. These considerations converge to compel the conclusion that the Commission should adopt a criterion for identifying network elements subject to mandatory unbundling based on the economic principles that underlie the essential facilities doctrine as it has been developed in antitrust jurisprudence—but without any need, such as successful antitrust prosecution and remedy have typically required, to demonstrate exclusionary practices or an intent to monopolize.

8. The test that the Commission should apply is a simple one: the element in question must be one without which it is not economically feasible to offer the end-product or service in question *and* that is economically infeasible for the would-be competitor to obtain from any source other than the ILEC, whether by purchase or by constructing its own facility. The ILEC, in other words, must enjoy a monopoly in its supply, in the simple and original meaning of that term.

9. Conversely, if, *within the relevant market*—a condition that I will amplify presently—competitors—indeed, a single competitor—are demonstrably acquiring that element from some source other than the ILEC, whether by purchase, lease or direct investment, that fact demonstrates that obtaining it from the incumbent is not "essential" in the most elementary meaning of the term, and sharing of that element should not be required. This assertion might be taken as implying that duopoly is synonymous or consistent with effective competition, a proposition that in itself most economists would probably be unwilling to accept. In the context of rapidly developing technologies (copper wire, coaxial cable, wireless, satellite, fiber) and correspondingly rapidly evolving and diverse service mixes, the entry of only a single rival

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one company had survived by virtue of its "superior skill, foresight, and industry." *Id.* at 429-430.

is likely to make a very significant difference. More directly pertinent, the ability of such an entrant to use its own facilities, whether by purchase or construction, without dependence upon those of the incumbent, clearly demonstrates in itself that the network elements of the incumbent are not "essential" to competition—a conclusion reinforced by consideration of the diverse technologies and capabilities converging on the offer of telecommunications services.

10. It follows that the economically proper identification of essential network elements that are to be subject to mandatory sharing must proceed element by element. The requirement, instead, that an ILEC provide a "platform" composed of *all* the elements of its network, without determination that each and every component is truly essential, flatly violates the foregoing principles. Whereas a required sharing of particular facilities the competitive duplication of which is truly infeasible cannot, by definition, discourage competitive investment, the mandatory offer of an entire "platform" deters facilities-based competition across the board.

11. It is worth reemphasizing, in conclusion, that the purpose of defining strictly the network elements properly subject to mandatory unbundling is *not* to limit the exposure of incumbent local exchange companies to competition. Much more important, from the standpoint of the public interest, is to avoid the anti-competitive consequences of a looser definition, which would discourage new, risky investment—not only by the incumbents but also by *existing* facilities-based CLECs, which have already invested billions of dollars of their own capital in challenging the historical monopolists and are investing billions more each year, and by new would-be entrants, by offering them the opportunity instead to free ride on the facilities of others.